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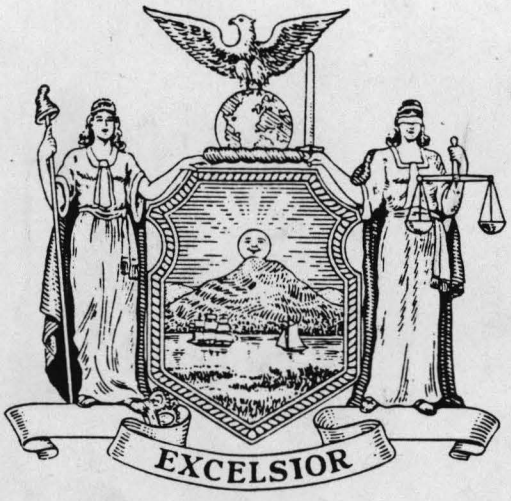
Ethics in Government Act: Report and Recommendations

New York State Commission on Government Integrity



ETHICS IN GOVERNMENT ACT: REPORT AND RECOMMENDATIONS

STATE OF NEW YORK
COMMISSION ON GOVERNMENT INTEGRITY

APRIL 6, 1988

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**Ethics in Government Act:
Report and Recommendations**

Introduction

"Morality can't be legislated, but behavior can be regulated."[1] Thus the Reverend Martin Luther King, Jr., spoke of the need for civil rights laws, and his words apply equally to the need for ethics legislation.

On July 2, 1987, the New York State Legislature passed the Ethics in Government Act (the "Ethics Act") and the New York Governmental Accountability Audit and Internal Control Act, which were signed into law on August 7, 1987.[2] Provisions of the legislation go into effect at different times, many as late as January 1, 1991.

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[1] Quoted in Preyer, "Legislative Ethics," in Annual Chief Justice Earl Warren Conference on Advocacy in the United States, Ethics and Government 67 (1982).

[2] Ethics in Government Act, ch. 813, 1987 N.Y. Laws 1404 (S.6441, A.8528); New York Governmental Accountability Audit and Internal Control Act of 1987, ch. 814, 1987 N.Y. Laws 1456. The Audit Act confers additional powers upon the State Comptroller within the State's accounting system; requires state agencies to establish comprehensive internal controls; and subjects the Offices of the Governor, Comptroller, and Attorney General, as well as the Legislature and the Judiciary, to a system of independent audits by certified public accounting firms every two years.

The Ethics Act covers statewide elected officials, state officers and employees, legislators, and legislative employees (collectively, "covered individuals") and, for some purposes, certain political party chairmen.[3]

The Act, among other things, prohibits covered individuals and political party chairmen from appearing or rendering services on behalf of private clients on certain matters before state agencies for compensation, and from engaging in various business transactions with state agencies.[4] The Act does not prohibit covered individuals and political party chairmen from the private counselling of clients on matters before state agencies, nor does it in any way restrict appearances by covered individuals on behalf of private clients before political subdivisions of the State. The Act also requires any employee who earns more than $30,000 in compensation from the State, or who

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[3]The Act also covers the judicial branch to the extent that it requires the Chief Judge, in consultation with the Administrative Board of the Courts, to approve a financial disclosure form for use by all judges, justices, and court officers and employees earning over $30,000. Ethics Act Section 17 (N.Y. Jud. Law § 211(4)). The Administrative Board has adopted the forms exactly as set forth in the Act. N.Y. Law Journal, March 18, 1988, at 1, col. 3.

[4]The Act is described in greater detail in the Appendix. This Report and its Appendix do not attempt, however, to describe all the details, exceptions, and ambiguities contained in the Act and instead address the Act's general terms.

holds a policy-making position, and political party chairmen, to file an extensive annual financial disclosure statement, the forms for which are set forth in the Act.

The Act is to be enforced by three separate agencies, one each for the legislative and executive branches and one for political subdivisions of the State (collectively, "ethics commissions"). These commissions may impose civil penalties for willful violations of certain provisions of the Act or may refer them for criminal prosecution. No such prosecution is permitted except upon referral by one of the agencies. "Cure" provisions permit those who have filed deficient disclosure statements to correct them within fifteen days after notice of the deficiencies, and to correct other conduct proscribed by the Act. The Act also pre-empts the applicability of professional disciplinary rules with respect to certain conduct expressly permitted by the Act.[5]

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[5]Certain provisions affect New York City, but the Act otherwise applies only at the state level and does not cover the State's political subdivisions, except that political subdivisions having a population of more than 50,000 must adopt their own financial disclosure forms by 1991, failing which the forms set forth in the Act will automatically apply. It is unclear on what basis political subdivisions of the State were entirely excluded from coverage by the broader substantive provisions of the Ethics Act. Small communities, no less than large ones, must grapple with conflicts of interest issues. This
(Footnote Continued)

* * *

While the Ethics Act makes important changes in our ethics laws, certain provisions and omissions remain deeply troubling.[6] The Act represents a significant step forward in the regulation of inappropriate conduct by New York State government officials. It is not a panacea for all the ills that currently plague government in New York State, but it provides momentum necessary for further improvements.

(Footnote Continued)
was made evident to the Commission when it undertook to gather citizens' views of local and state ethical issues throughout New York, and in investigations undertaken by the Commission. The Commission is convinced of the need for ethical guidelines applicable to all communities. Accordingly, the Commission is examining existing local codes of ethics and will shortly submit for public comment a preliminary draft ethics law for political subdivisions of the State. But see N.Y. Gen. Mun. Law §§ 801, 802, 805-a, 806.

[6] See, e.g., Memorandum from Robert Abrams, Attorney General of New York to Governor Cuomo at 6 (July 7, 1987) ("Abrams Memo"). See also Letter from Craig E. Polhemus, Counsel to the New York State Office for the Aging to Evan Davis, Counsel to the Governor (August 6, 1987) ("Polhemus Letter"); Memorandum from Gilbert Harwood, Counsel to the Higher Education Services Corporation to Evan Davis (August 3, 1987) ("Higher Education Services Memo"); Memorandum from Gail S. Shaffer, New York State Secretary of State to Evan Davis (July 23, 1987) ("Secretary of State Memo"); Memorandum from the New York State Bar Association to Governor Cuomo (July 23, 1987) ("NYSBA Memo"); Memorandum from Gene Russianoff, New York Public Interest Research Group to Evan Davis (July 3, 1987) ("NYPIRG Memo") (all contained in the Governor's Bill Jacket for S.6441). This Report does not attempt to address all the issues raised in these memoranda.

Summary of Recommendations

The New York State Commission on Government Integrity recommends amendments to the Act in order to strengthen its effect on the conduct of New York State government officials and employees that might interfere with their public responsibilities to the people of the State. Because ethical considerations are of equal concern to all branches of government, the Commission is of the view that uniformity of treatment of all branches, consistent with their functions, best engenders public respect and integrity in government. The Commission therefore urges that the legislature give further consideration to the ways in which the Act applies disparately to the different branches.[7] In keeping

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[7] See NYPIRG Memo, supra note 6. See also Letter of New York State Common Cause to Gov. Mario M. Cuomo (April 10, 1987) (contained in Governor's Bill Jacket on S.6441). For example, there is a two year post-employment ban on state officers' and employees' paid appearances before their own former agencies, as well as a lifetime bar on appearing or rendering services before any agency on matters in which they were "directly concerned and in which [they] personally participated" or which were under their "active consideration" during their government employment. Ethics Act Section 2.8 (N.Y. Pub. Off. Law § 73(8)). In contrast, although former legislators are barred from compensated lobbying for two years after their government service, former legislative employees are barred, also from compensated lobbying, only for the remainder of the term in which they served, and even then only in regard to bills in which they were "directly concerned and in which [they] personally participated." Id. Thus, legislative branch employees who leave on the last day of a term may commence private lobbying activities at the start of the

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with the Commission's mandate, however, the recommendations contained in this Report are limited in the case of legislators and legislative employees to the question of their appearances before state agencies and political subdivisions of the State.

Based upon investigations, interviews and correspondence with private individuals and public officials, and a comparative study of the laws and regulations of other jurisdictions, the Commission recommends that:

1. Covered individuals should be completely barred from making appearances, rendering services, and counselling on matters before state agencies for private clients, whether or not for compensation (pp. 14-18);

2. Covered individuals should be completely barred from making appearances, rendering services, and counselling on matters before political subdivisions of the State for private clients, whether or not for compensation (pp. 18-20);

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next term, perhaps within days, even on matters in which they were directly and personally involved.

3. Executive branch officers and employees should be required to disqualify themselves from participating in official action that is likely to affect their particular personal financial interests in a manner different from those of the general public (pp. 20-22);

4. The Act's referral mechanism for prosecution of violations should be repealed, and "cure" provisions should be expressly limited to allow correction only of unintentional violations of the Act (pp. 22-28);

5. The Act's pre-emption of professional disciplinary codes and other regulations governing ethical conduct should be repealed (pp. 28-34); and

6. The coverage of the financial disclosure provisions should be modified; the forms should be promulgated by the administering agencies; and exemption provisions should be modified (pp. 34-39).

Values Reflected in Conflicts of Interest Regulations

In order to evaluate the Ethics Act, the Commission first considered the competing values and tensions that arise when private citizens hold public office.

> The evil...[of conflicts of interest] is risk of impairment of impartial judgment, a risk which arises whenever there is temptation to serve personal interests. The quality of specific results is immaterial.... Like other fiduciaries, such as guardians, executors, lawyers, and agents, the public trustee has a duty to avoid private interests which cause even a risk that he will not be motivated solely by the interests of the beneficiaries of his trust. Properly conceived, conflict-of-interest regulation does not condemn bad actions so much as it erects a system designed to protect a decision-making process. It is preventive and prophylactic. Its aim is not detection and punishment of evil, but providing safeguards which lessen the risk of undesirable action.[8]

The oft-stated principle that "a public office is a public trust" suggests that those who act as public officers are

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[8]The Association of the Bar of the City of New York Special Committee on Congressional Ethics, Congress and the Public Trust 39 (1970)(emphasis added).

fiduciaries. Conflicts of interest arise when government officials face an overlap of their public duties and their private interests: for example, when they or their business associates represent private clients, particularly before government agencies, or when they have business interests that are regulated or otherwise affected by their decisions as officials of government. Although conflicts can also arise when public servants have personal or non-pecuniary interests at odds with their public duties, it would be impossible to control all these conflicts through legislation.

Economic interests are more appropriately made subject to uniform regulation. Even then, inherent conflicts that arise when a government official is affected by government decisions which affect all other homeowners or taxpayers equally must obviously be tolerated. Government officials necessarily have private interests like all other citizens; this is an inevitable and beneficial fact of life. In the case of elected officials especially, it is often a candidate's personal experiences and interests that enable constituents to determine whether the candidate will be sensitive to their specific and legitimate needs and interests.

Thus, however desirable it might seem to avoid all pecuniary conflicts of interest and the appearance of them, this

goal is nearly impossible to attain. Some federal, state, or local law touches nearly every aspect of our personal lives, particularly our business and financial transactions. Those who serve government on a part-time basis, or who have income or business interests outside of their government activity, or whose family members have such interests, are necessarily faced with all manner of real or potential conflicts.[9]

As public sensitivity to ethical standards of public servants has increased, there has been a tendency to assume that it is necessary to impose ever more stringent requirements prohibiting all conceivable conflicts. But the burdens on public servants must be taken into account, lest we discourage a significant number of honest, competent, and well-intentioned individuals from participating in government.

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[9] See Congress and the Public Trust, supra note 8, at 44. These issues generally arise to a much lesser extent for members of the judicial branch, where stringent conflict-of-interest rules already obtain. See, e.g., Code of Judicial Conduct, Canons 3.C(1)(c), 5.C. In addition, the New York Judiciary Law provides that a judge shall be disqualified from taking part in the decision of any action or proceeding "in which he has been attorney or counsel, or in which he is interested." N.Y. Jud. Law § 14.

In a study for the American Enterprise Institute for Public Research, Alfred S. Neely IV describes with intentional irony the conflict-free public servant:

> The ideal public servant should have no personal financial needs that the rewards he receives in return for his service cannot satisfy. There should be no need for part-time jobs to supplement his public income. And he should have no financial interests that might present conflicts. His personal finances should be simple. What he brings to government or accumulates while there should be invested in nothing more flamboyant than U.S. savings bonds.
>
> Naturally the ideal public servant must come from somewhere, but it is preferable if he comes to the government directly after graduation from the educational system. He will then not carry with him any baggage of potential conflicts arising from prior employment and experience. Moreover, the ideal public servant should have no desire or opportunity to move out of government service for any reason other than retirement or death.
>
> This ideal obviously does not exist....[10]

Thus, Mr. Neely concludes:

> ...[E]thics-in-government laws reflect one set of significant and worthwhile values. In great measure they serve to develop and protect public confidence in the integrity of government. It is important to note that present ethics-in-government laws do not attempt to achieve the highest conceivable standards. They are not unbending but reveal

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[10] A. Neely, Ethics-in-Government Laws: Are they Too "Ethical"? 53 (1984).

> a degree of pragmatism and compromise in response to the exigencies as well as the aspirations of good government.[11]

The Commission has thus grappled with the question: how can we best regulate the behavior of those who make and administer the law so as to protect the integrity of government without discouraging qualified citizens from participating in public service?

There are four common methods used in conflicts of interest laws to avoid real or apparent conflicts:

-- government officials may be prohibited from engaging in certain economic relationships;

-- they may be required to disqualify themselves from participating in government action that might affect their interests;

-- they may be required to disclose their financial interests, thus giving the public an opportunity to judge the propriety of their actions;

-- they may be required to divest themselves of any interest which may cause a conflict.

Each of these methods has been considered by the Commission in balancing the interests of the public and the

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[11] Id.

private financial interests of government officials under New York's new Ethics Act.

Recommendations

The Ethics Act should be amended as set forth below. These recommendations are intended to describe the objectives of proposed amendments to the Act; they are not phrased to suggest specific statutory language.

1. Covered individuals should be completely barred from making appearances, rendering services, and counselling on matters before state agencies for private clients, whether or not for compensation.

The Ethics Act bars appearances and the rendition of services for compensation relating to any matter before a state agency involving six broad areas: (i) the purchase, sale, rental, or lease of real property, goods or services, or a contract therefor, involving any such agency; (ii) rate-making proceedings; (iii) the adoption or repeal of rules or regulations having the force of law; (iv) obtaining grants of money or loans; (v) licensing; and (vi) proceedings relating to certain franchises. The Act thus prohibits covered individuals and political party chairmen from appearing before most state agencies for most purposes.[12]

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[12] See Ethics Act Section 2.7(a)(i-vi) (N.Y. Pub. Off. Law § 73(7)(a)).

Some proceedings, however, including certain administrative and criminal investigatory matters, are not covered by the Act. For example, the Act would permit a covered individual to represent a taxpayer in challenging administrative determinations concerning tax deficiencies. These challenges may be made before the Bureau of Conciliation and Mediation, and the Division of Tax Appeals, of the Department of Taxation and Finance.

Government employees' representation of private parties before public agencies inevitably creates an appearance of impropriety and the risk that even the best-intentioned actions by the agencies will be impaired by the presence of undue pressures. These appearances may compromise the impartiality of the government employees' decision-making because their official decisions could affect their clients', and hence their own, personal interests. Many government employees also exercise significant control over the budgets and operations of administrative and regulatory agencies. Their appearances before those agencies can lead to abuses of power, including coerced or biased decision-making by the agency in favor of the government employees' clients, or possible retaliation by government employees

against the agency for unfavorable decisions.[13] An agency official before whom government employees appear may respond to perceived "undue influence" even when none is intended.

Thus, while it is commendable that the Ethics Act restricts covered individuals' compensated appearances and rendition of services on matters before state agencies, public confidence in government integrity would be enhanced and better served by a total prohibition on all appearances on behalf of private clients that might raise even the spectre of undue influence. Indeed, heads of certain agencies have publicly urged that all appearances before their agencies, including some that are not now covered by the Act, be prohibited.[14] The Commission recommends that all appearances and rendition of services for whatever purposes before state agencies by covered individuals on behalf of private clients be barred.

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[13] See Reeves, Legislators As Private Attorneys: The Need For Legislative Reform, 30 UCLA L. Rev. 1052, 1056-59 (1983).

[14] See Abrams Memo, supra note 6 at pages 1-2; Letter of Roderick G.W. Chu, Commissioner of Taxation and Finance, President, State of New York Tax Commission, to the Honorable Mario M. Cuomo (July 17, 1987)("Tax Memo") pp. 1-2. At least as early as 1964, the Legislature's Special Committee on Ethics recommended "that members of the Legislature and legislative employees be prohibited from practicing or appearing before most state agencies for compensation." Report of the Special Committee on Ethics (March 1964) at page 4.

Nor does the Act prohibit uncompensated representation of private clients before state agencies in most circumstances. The Act should be amended to prohibit this practice by covered individuals. The appearance of undue influence and the possibility of undue pressure on state agencies, even if unintended, is no less present because a government employee is not accepting compensation.[15]

In addition, the Act now expressly permits unpaid internal research and discussion on matters before state agencies. Such unpaid counselling for private clients should be barred. The legislature has taken only the first step to distance covered individuals from inappropriate contacts by prohibiting certain personal appearances. Prohibiting private counselling would erect a complete barrier between the duties of a public servant and the interests of private clients who have matters pending before state agencies. Allowing private counselling on matters before state agencies creates the impression that a client is still getting special benefits by virtue of contact with a covered individual. This is especially so if the covered

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[15]Nothing in the Act prohibits -- or should prohibit -- a legislator (or legislative employee acting on his or her behalf) from advocating any position in any matter in the legislator's official capacity, whether or not on behalf of a constituent. Ethics Act Section 2.7(d) (N.Y. Pub. Off. Law § 73(7)(d)).

individual's law partner or business associate makes the actual appearance before the state agency on behalf of the client.

A total bar, including a bar on unpaid appearances, rendition of services, and counselling on matters before state agencies for private clients would help set to rest any suspicion that a covered individual's client enjoys an unfair advantage over other members of the public.

2. Covered individuals should be completely barred from making appearances, rendering services, and counselling on matters before political subdivisions of the State for private clients, whether or not for compensation.

The Ethics Act prohibits certain appearances by covered individuals before state agencies, but does not prohibit their appearances before political subdivisions of the State. There should be no such distinction. The same reasoning supporting restrictions on appearances before state agencies compels similar restrictions on appearances before all political subdivisions of the State. Covered individuals ought not to appear before local governments on behalf of private clients when the decisions of the covered individuals inevitably affect those governments.[16]

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[16]Mayor Koch supports such a bar and has stated that the Ethics Act prohibition "should be broadened to bar state officers
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Commission interviews with a number of current and former local officials have confirmed the view that, at the very least, an "appearance" problem exists whenever a state official contacts local government agencies on behalf of private clients. Regardless of the ultimate outcome, there is always the possibility of inappropriate pressure on a local official. One interviewee pointed out that New York City and its agencies rely heavily on appropriations from Albany, and that New York City "has a big case" pending before the Albany legislature every year. Thus, a legislator's request to a local agency on behalf of a private client should be considered as impermissible as a judge's request for a favor from a lawyer who has a case pending before the judge.[17]

Officials in smaller political subdivisions face equal, if not greater, pressure to please one who might have influence at the state level to benefit their localities. The Commission believes, therefore, that the prohibition against appearances

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and employees from appearing before local government agencies, where they may also exercise or appear to exercise undue influence." Letter, Mayor Edward I. Koch to Governor Mario M. Cuomo (April 15, 1987).

[17]Canon 5 of the Code of Judicial Conduct prohibits a variety of extra-judicial activities, including judges' business transactions with persons likely to come before them, in order to minimize the risk of conflict with their official duties.

should extend to those by covered individuals before all political subdivisions of the State and their agencies, not just before agencies of the State itself.

3. Executive branch officers and employees should be required to disqualify themselves from participating in official action that is likely to affect their personal financial interests in a manner different from those of the general public.

The Ethics Act does not require disqualification of a government employee in the event that the employee's official duties conflict with personal financial interests.[18]

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[18]Section 74 of the Public Officers Law, a precatory provision that contains New York's "Code of Ethics," does suggest that government employees should not engage in transactions as representatives of the State with businesses in which they have financial interests, and that they should abstain from making personal investments when they have reason to believe that those investments might be directly involved in decisions to be made by them. N.Y. Pub. Off. Law §§ 74(3)(e),(g). This is consistent with the notion that state officials and employees and legislators and legislative employees should regard their personal financial interests as subordinate to their responsibility to uphold the public trust. They should be sensitive to the possibility that any given business transaction might be viewed as creating a potential conflict, and only if it is unlikely to do so should they enter into the transaction.

Ethical Consideration 8-8 of the Lawyer's Code of Professional Responsibility similarly discourages attorneys holding public office from entering into transactions that "foreseeably may" create a conflict with the proper discharge of their public duties.

The clearest conflicts of interest arise when government officials, or their families or business associates, have interests in private entities that do business with, are regulated by, or are otherwise directly affected financially by actions of the agencies they work with. There are also less obvious economic relationships which may impair a public servant's ability to perform an official duty impartially. For example, a public official who receives an outside salary from, accepts gifts or honoraria from, holds investments in, owes a debt to, or is a director or officer in an entity affected by government action may face a conflict.

A government employee should not take official action that might be influenced by personal financial interests, and one who does should be subject to sanctions. Disqualification in cases of such conflict should be mandatory to protect the public from biased decision-making. Such prohibitions exist in other states,[19] as well as at the federal level.[20]

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[19] See, e.g., Hawaii Rev. Stat. § 84-14(a)(1985); La. Rev. Stat. Ann. § 42:1112(C) (West 1965); Md. Ann. Code art. 40A, § 3-101(a) (1986); Mich. Stat. Ann. § 4:1700(72)(7) (Callaghan 1985)(Mich. Comp. Laws § 15.342(7)).

[20] 18 U.S.C. § 208 (1987). Under this statute, a government official who does not give notice of a personal conflict and obtain prior written approval for continued participation in a

(Footnote Continued)

New York should accordingly require disqualification of government employees from taking official action on matters in which they have personal financial interests different from those of the general public.

4. The Act's referral mechanism for prosecution of violations should be repealed, and "cure" provisions should be expressly limited to allow correction only of unintentional violations of the Act.

There are serious deficiencies in the Act's enforcement provisions which require reappraisal and improvement.

(a) The Referral Mechanism for Criminal Penalties Should be Repealed.

If an individual knowingly and intentionally (or willfully) violates the conflict of interest or financial disclosure provisions of the Ethics Act, the ethics commission with jurisdiction over the offender can assess a civil penalty of up to ten thousand dollars.[21]

(Footnote Continued)
matter may be fined, imprisoned, or both. See United States v. Irons, 640 F.2d 872 (7th Cir. 1981).

[21]Ethics Act §§ 2.6, 2.14, 3.4 (N.Y. Pub. Off. Law §§ 73(6),(14), 73-a(4)).

The Act further provides, however, that the commissions may, in lieu of the civil penalty, refer a violation "to the appropriate prosecutor and upon ... conviction, but only after such referral, such violation shall be punishable as a class A misdemeanor."[22] Thus, if there is no administrative referral, there can be no criminal prosecution--even if the violation constitutes a crime, and even if facts supporting prosecution are uncovered by a separate and independent investigation.

The Commission is aware of no other state that conditions prosecution for violation of its ethics laws upon referral of an administrative agency.[23] In addition, the mutual exclusivity of remedies places the ethics commissions in the anomolous position of choosing between a certain, but possibly inadequate, civil sanction and an uncertain, but possibly more appropriate, criminal prosecution.

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[22] Id. (emphasis added).

[23] For example, sanctions of fine and/or imprisonment provided in the Maryland Public Ethics Law are not contingent upon commission action. Md. Ann. Code art. 40A §7-102 (1986). Virginia specifically provides that violations of its Ethics Law "may be prosecuted notwithstanding the jurisdiction of, or any pending proceeding before, the House or Senate Ethics Advisory Panel." Va. Code § 2.1-639.61 (1987)

By providing that a violation of the Ethics Act may be prosecuted as a misdemeanor only after commission referral to a prosecutor, the Act substantially dilutes the purpose of independent prosecutorial agencies.[24] Further, violations of some of the provisions of Section 73 of the Public Officers Law that are affected by the new referral mechanisms were already punishable as misdemeanors under prior law, and without a referral of any kind.[25] This effective withdrawal of independent discretion to

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[24] See Letter from Robert M. Morgenthau on behalf of the District Attorneys Association of New York to Gov. Mario M. Cuomo (July 15, 1987) ("D.A.'s Letter"); Abrams Memo, supra note 6, at pages 2-3; Higher Education Services Memo, supra note 6, at page 2; Polhemus Letter, supra note 6, at page 1; NYSBA Memo, supra note 6, at page 2.

[25] N.Y. Pub. Off. Law § 73(10) (old law). The prior law and the new law have many similar prohibitions. Compare N.Y. Pub. Off. Law § 73(2)-(5), (7) (old law) with Ethics Act Section 2 (N.Y. Pub. Off. Law § 73). In both laws, subdivision (2) prohibits a state officer or employee from receiving a contingent fee for an appearance before a state agency; subdivision (3) prohibits state officers from appearing against the State for compensation in the Court of Claims; subdivision (4) prohibits a political party chairman or a state official from selling goods to the State or contracting with the State unless the contract is awarded after notice and competitive bidding; and subdivision (5) prohibits a state officer from accepting anything of value which may influence that officer's actions. Subdivision (7) of the prior law, retained and renumbered as subdivision (8) in the new law, prohibits a state officer from appearing before the agency with which that officer was associated for two years after leaving office. Knowing and intentional violations of any of these provisions was a misdemeanor under the prior law. N.Y. Pub. Off. Law § 73 (10) (old law); see also Abrams Memo, supra, note 6, at page 4; People v. Zambuto, 73 A.D.2d 828, 423 N.Y.S.2d 770 (4th Dep't 1979). In addition, N.Y. Penal Law §§ 200.30 &

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prosecute violations of the Ethics Act may well be unconstitutional.[26]

Whether or not it is unconstitutional, the referral mechanism sends a wholly inappropriate message to the citizens of this State. It feeds every citizen's worst fear: that public

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200.35 prohibit gifts to public officials for the performance of official duties. N.Y. Penal Law § 175.45 provides that a person issuing a false financial statement with intent to defraud is guilty of a Class A misdemeanor. N.Y. Penal Law § 173.35 provides that a person "offering a false instrument for filing" with intent to defraud the State is guilty of a Class E felony.

[26]The New York Constitution provides:

> The power of the grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

N.Y. Const. art. I, § 6. Administrative referral as a condition precedent to a district attorney's prosecution may violate these provisions. See, e.g., D.A.'s Letter, supra note 24; Letter from Elizabeth Holtzman, District Attorney of Kings County, to Governor Mario M. Cuomo (July 24, 1987); see also Abrams Memo, supra note 6; NYPIRG Memo, supra note 6.

By contrast, Senator Warren M. Anderson, a sponsor of the Ethics Act, defends the constitutionality of the referral mechanism as "well within [the legislature's] power to define or redefine the misdemeanor violations". Letter of Warren M. Anderson to John D. Feerick (December 7, 1987) ("Anderson Letter") at page 3. Moreover, if the referral provision were to be found unenforceable, Senator Anderson concludes that "the entire misdemeanor provisions should be unenforceable unless and until the Legislature enacts a new law to replace them." Id.

officials have something to hide and intend to hide it. As Justice Brandeis stated:

> Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example.[27]

The government should not teach that private citizens are subject to the inquiries of an independent prosecutor, while those who hold government office are not.

(b) The Act's Cure Provisions Should be Clarified to Apply Only to Unintentional Violations.

The Ethics Act provides a 15-day period during which a covered individual who is in possible violation of the Act may cure any "deficiency" in a financial disclosure form. If the deficiency is cured, no action is taken, and the deficiency is never publicly disclosed. The Act also seems to provide an undefined opportunity for "any potential conflict of interest violation" to be "rectified".[28] It is unclear whether these cure provisions pre-empt criminal or civil sanction in the event that the violations are intentional.

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[27] Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

[28] Ethics Act Sections 7.11 & 12, 9.10 & 11, 16.11 & 12 (N.Y. Exec. Law §§ 94(11) & (12), N.Y. Legis. Law §§ 80(10) & (11), N.Y. Gen. Mun. Law §§ 813(11) & (12)).

In testimony before the Commission, Governor Cuomo and his Counsel expressed the view that the 15-day cure provision pre-empts further action only in cases involving inadvertent or innocent infractions, not willful violations, of the Act.[29] Yet, another plausible reading of this section as enacted is that a cure pre-empts any further action in all cases, or that a willful violation is, by definition, only one that the violator refuses to cure. New York County District Attorney Morgenthau, writing on behalf of the District Attorneys Association of New York, interprets the Ethics Act to permit a complete cure in every case, and objects to it on that ground: "No other law permits a violator such an opportunity to undo his crime with full confidentiality. The result is that serious misconduct will go unpunished."[30]

Clearly, one who has been guilty of a "willful violation" ought not to be given any grace period to cure the unlawful behavior after notice from an oversight agency. The Commission

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[29] See transcript of proceedings before the Commission on September 9, 1987, at pages 5-6. See also Anderson Letter, supra note 26 (to like effect).

[30] D.A.'s Letter, supra note 24, at page 2. The administrative procedures for notice and opportunity to cure are confidential under the Ethics Act, so that the public cannot monitor the proceedings. Ethics Act Sections 7.12(a), 9.11(a), 16.12(a) (N.Y. Exec. Law § 94(12)(a), N.Y. Legis. Law § 80(11)(a), N.Y. Gen. Mun. Law § 813(12)(a)).

recommends that the Ethics Act be amended to provide explicitly that procedures and penalties for willful violations of the Ethics Act are not pre-empted by the cure provisions.

5. The Act's pre-emption of professional disciplinary codes and other regulations governing ethical conduct should be repealed.

The Ethics Act pre-empts the application of professional disciplinary rules under certain circumstances.[31] It provides that former legislators and legislative employees are not subject to "any provision of the judiciary law, the education law, or any other law or disciplinary rule" in regard to conduct authorized by the revolving door provisions of the Act.

The same exemption from professional disciplinary rules applies to appearances and the rendition of services before state agencies by members of firms, associations, and corporations that are affiliated with present or former covered individuals (and political party chairmen), as long as these individuals receive no revenues from these matters.

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[31]Ethics Act Section 2.11(a) & (c) (N.Y. Pub. Off. Law § 73(11)(a) & (c)).

This provision of the Act effectively insulates those who fall within its purview from the reach of existing and future ethical codes of professional conduct to which they would otherwise be answerable. Affected groups include attorneys, real estate brokers, accountants, engineers, architects, and health professionals.

With respect to attorneys, the pre-emption provision withdraws from the New York State courts the power to discipline lawyers for conduct proscribed by the Lawyer's Code of Professional Responsibility.[32] It is important to note that the Code makes no distinction between attorneys in and out of government. Indeed, the American Bar Association considered and rejected a

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[32]The Code, which governs the ethical conduct of members of the bar of the State of New York, appears as an Appendix to the New York Judiciary Law and has been incorporated by reference by each Appellate Division in the State in its respective rule defining professional misconduct. 22 N.Y.C.R.R. 603.2, 691.2, 806.2, 1022.17.

A substantial violation of the Code may constitute grounds for censure, suspension, or removal of an attorney from the practice of law in New York, pursuant to N.Y. Jud. Law § 90(2). See In Re Connelly, 18 A.D.2d 466, 240 N.Y.S.2d 126 (1st Dep't 1963). The Judiciary Law, in turn, acknowledges that an attorney's professional conduct is uniquely regulated by the courts, of which the attorney is an officer. In Re Cohen, 7 N.Y.2d 488, 166 N.E.2d 672, 199 N.Y.S.2d 658 (1960), aff'd, 366 U.S. 117 (1961).

The pre-emption provision of the Act has been severely criticized by the New York State Bar Association. See NYSBA Memo, supra note 6, at pages 4, 6-7.

proposal of the National Association of Attorneys General that the conflict-of-interest sections of the Code's proposed successor, the Model Rules, be made inapplicable to lawyers in government service.[33]

Among the principles espoused in the Code potentially implicated by the Act are the following:

> -- A lawyer shall not accept private employment in a matter in which the lawyer had substantial responsibility while he or she was a public employee.[34]
>
> -- A lawyer who holds public office shall not use his or her public position to influence, or attempt to influence, a tribunal in favor of a client.[35]
>
> -- A lawyer who is a public official should not engage in personal or professional activities that may conflict with the lawyer's official duties.[36]
>
> -- A lawyer shall not accept professional employment if the exercise of his or her professional judgment on behalf of a client may be affected by the lawyer's own financial, business, property or personal interest.[37]

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[33] See Josephson & Pearce, To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?, 29 How. L. J. 539, 557 n.86 (1986).

[34] DR 9-101(B).

[35] DR 8-101(A)(2).

[36] EC 8-8.

[37] DR 5-101(A).

> -- If a lawyer must decline employment on the grounds that representation of one client may impair the lawyer's judgment with respect to another, then no partner or associate of the lawyer, or of the lawyer's firm, may accept or continue such employment.[38]
>
> -- A lawyer shall not accept compensation for legal services from someone other than his or her client, except by the client's consent.[39]

To the Commission's knowledge, this is the first time that the legislature in its 200-year history has expressly superseded the disciplinary power of the courts, and the occasion for the departure is particularly ill-chosen. Withdrawing oversight authority from an independent court system while claiming to enhance government ethics can only engender public skepticism. Indeed, as with the prosecutorial referral mechanism described above, the Commission is aware of no other state which effectively exempts covered individuals from compliance with existing laws and disciplinary codes. The Commission strongly disapproves the withdrawal of the authority of professional organizations to impose standards of conduct upon their members that may be more stringent than those deemed desirable by the legislature.

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[38] DR 5-105(D).

[39] DR 5-107(A)(1).

With respect to the underlying question whether firms should be vicariously disqualified by the Act itself, the Commission is persuaded that the Act's prohibitions on appearances before state agencies, coupled with the broadening of these bars as specified in the Commission's Recommendation 1,[40] will reduce both the reality and the appearance of conflicts. The Commission further recommends, however, that the Act's approach to limitations on appearances stand only on an experimental basis and that the legislature revisit this issue within one year after the effective date of the Act.[41] At that time, the legislature

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[40] See supra pp. pages 14-18.

[41] Commissioner Richard D. Emery dissents and expresses the following views: The prohibition on covered individuals appearing before state or municipal agencies should apply to their law or business associates as well. The impropriety, or appearance of impropriety, which occurs when a public official or employee appears before a state or local agency on behalf of a private client is no less when the partner of the public official or employee does so. Traditionally, attorneys have been barred by ethics codes from serving two masters and, when they are barred, their partners have been as well. The duty of a legislator to constituents is at least as compelling as that of a lawyer to a client, and the two should never be allowed to conflict. When partners of legislators represent clients before state or municipal agencies, the legislator's duty to constituents is compromised.

While such a rule might require legislators or their staff members not to join, or to resign from, large law or other professional firms, that would be an acceptable price to pay to avoid the chilling effect on government decision-makers when powerful legislators' partners are seeking to influence their decisions. Twenty-five percent of the members of both houses of the legislature combined are attorneys.

should determine, in light of the new prohibitions and disclosures made under the Act,[42] whether the prohibitions on appearances before state agencies should be extended to firms, associations, and corporations affiliated with covered individuals.[43] It may be, for example, that the presence of a legislator's name on the letterhead of the firm is alone sufficient to create an appearance of conflict or cause the citizenry to doubt the even-handed administration of government. In that case, the legislature should not hesitate to impose requirements more stringent than those contained in professional rules; but in any event the legislature should not interfere, as it has in the

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[42]Ethics Act Section 8 (N.Y. Exec. Law § 166) provides that state regulatory agencies must keep public records of attorneys, agents, and representatives who appear before them "for ... a fee". The Commission recommends that this section be amended to require records of uncompensated, as well as compensated, appearances (see supra Recommendation 1), that this information be maintained in a useful form, and that it be given appropriate public dissemination.

[43]Establishment of a full-time legislature would be one way in which to avoid conflicts of interest and the appearance of them, particularly those conflicts resulting from the dealings of legislators' law partners and business associates with state agencies. The Commission, however, takes no position on such a major change in New York State government. The Commission understands that this issue has been committed to the "Pay Commission" recently appointed by Governor Cuomo.

pre-emption provision of the Act, with minimum ethical standards imposed by professional organizations on their members.[44]

6. The coverage of the financial disclosure provisions should be modified; the forms should be promulgated by the administering agencies; and exemption provisions should be modified.

The Commission endorses the principle of broad financial disclosure.[45] The disclosure provisions of the Ethics Act

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[44]For the current standards applicable to vicarious disqualification of firms associated with government officials, see, e.g., Lawyer's Code of Professional Responsibility DR 5-105(D); New York State Bar Association Ethics Opinion 415 (1975); New York State Bar Association, Draft of the Lawyer's Code of Professional Responsibility (October 5, 1987) at 68, 112.

[45]Commissioners James L. Magavern and Richard D. Emery support a different approach to disclosure, which they believe would prove both less intrusive upon the personal lives of state employees and more effective in protecting the public interest. In their view, the annual statement specified by the current Ethics Act requires disclosure of considerable information that will only rarely be relevant to anything the employee will ever do in his or her state position. The form and scope of disclosure are intimidating and may discourage people in and from public service. Review of the form by the ethics commissions will hardly be more than perfunctory. At the same time, the form specified by the Act does not require information as to somewhat more remote interests and relationships that might influence the employee in his or her official acts. For example, a government inspector's interest in approving conditions at a relative's employer's establishment will not be revealed in any disclosure statement. They believe that, instead of annual, uniform disclosure for all covered employees, regardless of relevance to their particular jobs, the Act should require disclosure on a transactional basis. Before taking action in a particular matter in which the employee (or a party related to the employee by family or business) has an interest, the employee should be

(Footnote Continued)

are among the most important in the entire law.[46] The Commission nonetheless recommends changes in the law to improve its effectiveness.

The Act provides that all government employees who earn more than $30,000 from their government employment must file a disclosure form unless they can show, to the satisfaction of the appropriate commission, that they do not occupy a policy-making position and do not perform certain functions specified in the Act.[47]

(Footnote Continued)
required to file a transactional disclosure statement identifying that interest and relationship in reasonable detail. Information thus disclosed would be more relevant to a particular transaction than any annual disclosure. It would be more difficult for the employee to withhold or obfuscate relevant information. And, by focussing on a particular transaction, disclosure would serve to alert the employee, his or her associates, other parties, and the public to potential conflicts of interest. Commissioner Magavern is also of the view that, particularly in the case of the Temporary State Commission on Local Government Ethics, the review procedures for annual disclosure statements will be unworkable and offensive to notions of Home Rule.

[46]Ethics Act Sections 3 & 14 (N.Y. Pub. Off. Law § 73-a, N.Y. Gen. Mun. Law § 811).

[47]Ethics Act Sections 3.2(a), 7.9(k), 9.8(d). (N.Y. Pub. Off. Law § 73-a(2)(a); N.Y. Exec. Law § 94(k)). See also Ethics Act Section 9.8(d) (N.Y. Legis. Law § 80(8)(d)). Many other individuals are also required to file statements.

The Act thus presumes that all employees earning over $30,000 occupy positions of authority sufficient to warrant the imposition of financial disclosure requirements. It is estimated that over 65,000 government employees may be required to file forms under this provision.[48] The consequence will very likely be an almost insurmountable burden of paperwork, resulting in inadequate enforcement of the disclosure requirements, and disrespect for the Act's requirements among many employees now covered for no apparent purpose.

The Commission recommends that, as in other states, financial disclosure requirements be keyed to particular policy-making offices, rather than to salary levels.[49] In this way, disclosure is assured from those persons actually making policy decisions, and neither the ethics commission charged with

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[48]Memorandum of Division of the Budget, July 29, 1987, Paragraph 5. The scope of coverage is criticized in Higher Education Services Memo, supra note 6; Tax Memo, supra note 14, at page 2; Polhemus Letter, supra note 6; Letter of Donald E. Urell, Counsel, New York State Executive Department Division for Youth to Evan A. Davis (July 13, 1987); Letter of Howard A. Fromer, Counsel, New York State Energy Office (July 16, 1987); Letter of Raymond C. Green, General Attorney, State Insurance Fund to Evan A. Davis (July 10, 1987); Memorandum of Jeffrey Chamberlain, Counsel, New York State Police to Evan A. Davis (August 3, 1987).

[49]See, e.g., Hawaii Rev. Stat. §84-17 (1985); Mass. Ann. Laws ch. 268B, §§ 1 & 3 (1987).

reviewing the disclosure forms nor the state employees obligated to submit them will be unnecessarily burdened. The appropriate commission, in consultation with each agency, is best equipped to promulgate a list of those offices for which disclosure forms should be provided.

The Commission also believes that the inclusion of actual financial disclosure forms in the text of the law is ill-advised.[50] It creates an unnecessary obstacle to improvement of the forms, since modification will require legislative, rather than administrative, approval. The Commission urges that the law be amended to provide minimum disclosure requirements, but to allow the appropriate commission to generate the specific forms, in order to facilitate amendment in light of experience.

Finally, the Act contains two exemption provisions, both of which should be modified. First, the Act allows covered individuals to omit financial information from their disclosure forms, or to have deleted certain information for purposes of public dissemination, if the covered individuals can demonstrate that the information has "no material bearing" on their official

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[50]Ethics Act Sections 3.3, 15.5 (N.Y. Pub. Off. Law § 73-a(3), N.Y. Gen. Mun. Law § 812(5)).

duties.[51] Second, the Act provides that actual values of financial interests are not publicly disclosed under any circumstances.[52]

The Commission questions the appropriateness of these exemptions. A vague policy permitting individual exceptions to an otherwise uniform requirement undermines public confidence and invites suspicion that the standard for what has a "material bearing" on official duties will not be interpreted even-handedly. The commissions should have the power to suspend or modify a reporting requirement only if they find (a) that its strict application works a manifestly unreasonable hardship and (b) that such suspension or modification will not frustrate the purposes of the law.

The exemption from public disclosure of the values of financial interests is inappropriate and should be repealed. As a general proposition, the greater the role of secrecy in the business dealings of government officials, the less confidence

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[51]Ethics Act Sections 7.9(h-i), 9.8(h-i), 16.9(h-i) (N.Y. Exec. Law § 94(9)(h-i), N.Y. Legis. Law § 80(8)(h-i), N.Y. Gen. Mun. Law § 813(9)(h-i).

[52]Ethics Act Sections 7.17(a)(1), 9.16(a)(1), 16.18(a)(1) (N.Y. Exec. Law § 94(17)(a)(1), N.Y. Legis. Law § 80(16)(a) (1), N.Y. Gen. Mun. Law § 813(18)(a)(1)).

government itself can expect to inspire. Publicly reporting the values of financial interests held by covered individuals is, in large part, the purpose of the financial disclosure requirement -- it facilitates public scrutiny of business interests at odds with the impartial execution of public duties.

Conclusion

Law, like the society it reflects, is constantly changing. It is informed by the ideals of the people who create it and it, in turn, influences their behavior. Nowhere is this more evident than in laws regulating ethics in government. It is by enacting rules for government officials that the public articulates acceptable standards of conduct and helps to determine the integrity of its government.

The Ethics in Government Act is an important beginning. The public has demanded higher standards from its government officials and employees, and the government has begun to respond. Some conduct previously countenanced by law has now been deemed unacceptable.

The process, however, is not complete -- nor should it ever be. No body of law which seeks to regulate the complexities of conflicts in government service will ever achieve perfection. Nonetheless, the law should always strive to demand that those who hold the public trust remain worthy of it. The Commission

believes that the changes urged in its recommendations are essential to this endeavor.

NEW YORK STATE COMMISSION
ON GOVERNMENT INTEGRITY

John D. Feerick
Chairman

Richard D. Emery
Patricia M. Hynes
James L. Magavern
Bernard S. Meyer
Bishop Emerson J. Moore
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APPENDIX

Appendix

Summary of the Ethics Act

The Ethics Act[1] includes the following provisions:

1. Appearances Before State Agencies

The Act prohibits statewide elected officials, state officers and employees, and legislators and legislative employees (collectively, "covered individuals"), as well as political party chairmen (but not their law firms or business associates), from making appearances or rendering services for compensation relating to matters before a state agency on behalf of private clients in relation to: (i) the purchase, sale, rental, or lease of real property, goods or services, or a contract therefor, involving any such agency; (ii) rate-making proceedings; (iii) the adoption or repeal of rules or regulations having the force of law; (iv) obtaining grants of money or loans; (v) licensing; and (vi) certain franchise proceedings[2]. Some proceedings, including

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[1]Ethics in Government Act, ch. 813, 1987 N.Y. Laws 1404 (S.6441, A.8528). The Ethics Act will be codified in various sections of New York's Public Officers Law, Executive Law, Legislative Law, Judiciary Law, and General Municipal Law.

[2]In this Report and Appendix, as in the Act, "statewide elected officials" refers to the Governor, Lieutenant Governor, Comptroller, and Attorney General. "State officers and employees" refers to heads, deputies, assistants, officers, and employees of state departments; officers and employees of statewide elected officials; officers and employees of state boards, bureaus, divisions, commissions, and councils; and members, directors, and employees of public authorities, public

(Footnote Continued)

certain administrative and criminal investigatory proceedings by state agencies, are not covered by these prohibitions.

The Ethics Act, like previous law, prohibits covered individuals (but not political party chairmen) from receiving contingent compensation for any services rendered before a state agency, whether or not those services fall within the six categories described above. Prohibitions on compensated appearances against the interests of the State in the Court of Claims are also continued. There is no prohibition against uncompensated appearances before state agencies or the Court of Claims, except for post-employment appearances by state officers and employees before their former agencies, which are entirely barred for a period of two years after termination of government service. The Act specifically authorizes internal discussion and research by covered individuals for private clients on matters pending before state agencies, as long as the clients are not charged for that discussion and research and the covered individuals do not share in the net revenue produced by those matters.

(Footnote Continued)
benefit corporations, and commissions at least one of whose members is appointed by the Governor. "Political party chairmen" includes, for most purposes, individuals performing the functions or exercising the powers of such chairmen. Ethics Act Section 2.1 (N.Y. Pub. Off. Law § 73(1)). State agencies are defined to include any of the state departments, the State University of New York, and the City University of New York, as well as public benefit corporations, public authorities, and commissions at least one of whose members is appointed by the Governor. Ethics Act Section 2.1(g) (N.Y. Pub. Off. Law § 73(1)(g)).

Firms, associations, or corporations connected with present or former covered individuals (and political party chairmen) may appear before, render services to, and transact business with a state agency, provided that the covered individual does not share in the net revenues or "acting in good faith, reasonably believed that he or she would not share in the net revenues." A similar provision applies to appearances and transactions by firms of covered individuals before the Court of Claims.

The Act also contains other exceptions allowing appearances before state agencies. Appearances involving ministerial matters are expressly permitted. Covered individuals may of course act on any matter in their official capacity, and legislators and legislative employees, specifically, may act as "public advocate[s] whether or not on behalf of a constituent." Individuals already appearing or rendering services in a particular matter as of January 1, 1988, are not prohibited from continuing to do so after that date if substitution of counsel would impose a substantial hardship on the client.[3]

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[3]Ethics Act Sections 2.2; 2.7(a), (c), (d), & (g); 2.10; 18 (N.Y. Pub. Off. Law §§ 73(2), (7)(a), (c), (d), & (g), (10)).

2. Revolving Door Provisions

The Ethics Act limits former state officers and employees with respect to rendering services on behalf of private clients before their former state agencies. It prohibits such appearances, whether or not for compensation, for a period of two years dating from separation from government service. It forever prohibits appearances relating to matters with which the officers and employees were directly concerned and personally involved. Former legislators are prohibited from receiving compensation for lobbying on any matter for two years after they leave the legislature. There is no bar on former legislators for uncompensated lobbying, however, and no lifetime bar. Prohibitions are also placed on compensated lobbying by former legislative employees, but only for the balance of the legislative term in which they were employed, and then only with respect to matters with which they were directly concerned and personally involved while employed by the legislature.[4]

3. Sale of Goods And Services

The Ethics Act prohibits covered individuals and certain political party chairmen (or their firms or associations,

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[4]Ethics Act Section 2.8 (N.Y. Pub. Off. Law § 73 (8)). With approval of the Legislative Ethics Committee, a legislative employee may receive compensation for performing such services if the participation was "primarily in a supervisory capacity [and the employee] was not personally involved in... the matter to an important and material degree...." Id. See also infra page A-7.

or corporations of which these individuals own or control 10% or more of the stock) from selling more than $25 worth of goods or services to a state agency. They are also prohibited from contracting for, or providing services with or to, a private entity when "the power to contract, appoint or retain" on that entity's behalf is "exercised ... by a state agency or officer thereof." There is an exception if such goods or services are provided by competitive bidding. Similar prohibitions are placed upon political party chairmen in New York City with respect to contracts with agencies within the City.[5]

Covered individuals are also barred from soliciting, accepting, or receiving a gift valued at $75.00 or more if it might reasonably be inferred that the gift was intended, or could reasonably be expected, to influence them in the performance of their official duties, or was "intended as a reward" for any official action. Offering or making such a gift is also prohibited.[6]

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[5]None, however, are placed by the Ethics Act on municipal officials in New York City or elsewhere in New York State. The New York City Charter does place prohibitions of this kind on New York City employees and members of the Board of Estimate and City Council. Section 2604(b)(1). N.Y. Gen. Mun. Law § 801 prohibits certain conflicts of interest of municipal officers and employees, with numerous exceptions codified in Section 802. Some municipal ethics codes, adopted locally pursuant to N.Y. Gen. Mun. Law § 806, may also contain restrictions of this kind. See also N.Y. Gen. Mun. Law § 805-a.

[6]Ethics Act Sections 2.4, 2.5 (N.Y. Pub. Off. Law §§ 73(4),(5)). N.Y. Gen. Mun. Law § 805-a(1), proscribing municipal officers' receipt of gifts under "circumstances in which it could reasonably be inferred that the gift was intended to influence"

(Footnote Continued)

4. Financial Disclosure Provisions

The Ethics Act imposes financial disclosure requirements on statewide elected officials, state officers and employees, legislators and legislative employees, judges and judiciary branch employees, as well as on certain political party chairmen.[7] The sources of personal income, the nature of investments, and the extent of real property holdings disclosed pursuant to these requirements will be made public under the Ethics Act, but the value of these disclosed items will not. Those required to file statements under the Act may seek an exemption from disclosure of interests having "no material bearing" on the discharge of their official duties.[8]

The Ethics Act further requires political subdivisions (counties, cities, towns, and villages) with populations of over

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(Footnote Continued)
them, was held to be unconstitutionally vague in People v. Moore, 85 Misc. 2d 4, 377 N.Y.S.2d 1005 (Fulton County Ct. 1975). The Court of Appeals, however, has not addressed the constitutionality of the statute. See also Binghamton Civil Service Forum v. City of Binghamton, 44 N.Y.2d 23, 374 N.E.2d 380, 403 N.Y.S.2d 482 (1978).

[7]Under the Ethics Act, chairmen of state political party committees and political party chairmen in counties with a population of over 300,000 or who earn more than $30,000 are required to file financial disclosure statements. Thus only one-sixth of the 62 county chairmen in the State will be covered by this provision.

[8]Ethics Act Sections 3, 7.17(a)(1), 9.16(a), 16.17(a), 17.4 (N.Y. Pub. Off. Law § 73-a, N.Y. Exec. Law § 94(17)(a)(1), N.Y. Legis. Law. § 80(16)(a), N.Y. Gen. Mun. Law § 813(17)(a), N.Y. Jud. Law § 211(4)). Section 2.6(a) of the Act (N.Y. Pub. Off. Law § 73(6)(a)) provides that all legislative employees not covered by Section 73-a must file an abbreviated, less detailed financial disclosure statement.

50,000 to adopt their own financial disclosure requirements. The Act provides no minimum standard for these requirements, except that New York City must adopt forms at least as stringent as those contained in the Act. A political subdivision that fails to adopt such requirements by January 1, 1991, however, will be subject to the disclosure requirements contained in the Ethics Act.[9] Approximately 80 of the 1616 political subdivisions in New York State, or fewer than 5%, will be required to adopt disclosure requirements under this provision.[10]

5. Enforcement Agencies

The Act creates three enforcement agencies: the State Ethics Commission, the Legislative Ethics Committee, and the Temporary State Commission on Local Government Ethics (collectively, "commissions").

The State Ethics Commission is made up of five members appointed by the Governor. The Attorney General and the Comptroller each nominate one member. Of the remaining three members, no more than two may be of the same political party. At least two members must be individuals who do not hold public

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[9]Ethics Act Sections 14, 15.3 (N.Y. Gen. Mun. Law §§ 811, 812(3)).

[10]This provision will, however, cover political subdivisions in which the greater part of New York State's population resides.

office, and none may hold political party office or be employed as a lobbyist.

The Legislative Ethics Committee consists of eight members, all of whom must be legislators. Two members are appointed by the President pro tem of the Senate, two by the Speaker of the Assembly, and two each by the minority leaders of each house.

There are nine members of the Temporary State Commission on Local Government Ethics, appointed by the Governor. The minority and majority leaders of both houses of the Legislature each nominate one member. Of the remaining five members, no more than three may be of the same political party, and at least three must be individuals who do not hold public office. None may hold political party office or be employed as a lobbyist.

These commissions are charged with the task of enforcing the law's financial disclosure and conflict of interest regulations. The major difference between them is jurisdictional: the State Ethics Commission has jurisdiction over matters involving statewide elected officials, candidates for these offices, political party chairmen, and state officers and employees; the Legislative Ethics Committee exercises authority over members of the legislature, legislative employees, and candidates for the legislature; and the Temporary State Commission on Local Government Ethics is concerned with the conduct of local elected

officials, local political party officials, and local officers and employees.

The commissions must, among other things: adopt procedures governing the filing of financial disclosure statements; review the statements when they are filed; and determine, on application by the filer, whether any of the information revealed in disclosure statements may be withheld from public inspection.

Each of the ethics commissions is also authorized to receive and investigate complaints alleging violations of the Ethics Act. Additionally, the commissions must render advisory opinions on the requirements of the Ethics Act upon the request of a person subject to the jurisdiction of the commission. These opinions are binding on the commissions (unless amended or revoked) in any subsequent proceeding concerning the person who requested the opinion, as long as that person acted in good faith in requesting the opinion and made no omissions or misstatements of material fact in the initial request. The opinions may also be relied upon as a defense in any criminal or civil action. Requests for opinions are confidential but may be published by the commissions as long as the name of the requesting person and other identifying details are omitted.[11]

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[11]Ethics Act Sections 7, 9, 16 (N.Y. Exec. Law § 94, N.Y. Legis. Law § 80, N.Y. Gen. Mun. Law § 813).

6. Advisory Councils

The Act establishes an advisory council for each of the three commissions and, although there are some differences in the manner of their appointment, they have similar duties. Upon application by a reporting individual, they may permit that individual to delete information from the public copy of a financial disclosure statement upon a showing that that information has no material bearing on the discharge of the individual's official duties. In addition, the councils may permit exceptions to the filing requirement itself with respect to information concerning the filer's family. If a request is denied, the filer must be informed of the right to appeal to the appropriate "parent" commission. In the event of a second adverse determination, the filer may institute an action against the commission under Article 78 of New York Civil Practice Law and Rules. Alternatively, the filer may request a 30-day period during which all information in the application shall remain confidential. If the filer resigns his or her office and holds no other office subject to the jurisdiction of the commission, the information is not made public and is expunged.

The advisory councils may certify to the appropriate "parent" commission certain questions which may recur or which apply to a large number of covered individuals.[12]

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[12]Ethics Act Sections 7.18, 9.17, 16.17 (N.Y. Exec. Law § 94 (18), N.Y. Legis. Law § 80 (17), N.Y. Gen. Mun. Law § 813 (17)).

7. Investigations and Penalties

If a commission receives a financial disclosure statement indicating a possible violation of the financial disclosure or conflicts of interest provisions of the Ethics Act, or a sworn complaint alleging such a violation, it must investigate. The commission may also decide on its own initiative to begin an investigation. Once an inquiry is begun, the commission must notify the subject of the investigation of the charges and offer a chance to submit a written reply. In cases in which further investigation is deemed justified, the commission must give the subject an opportunity to be heard. The subject of the investigation must also be informed of the commission's rules regarding adjudicatory proceedings. Up to this point, the investigation is confidential. Where no violation is found, both the subject of the investigation and the complainant must be so notified. If the commission determines, however, that there is reasonable cause to believe that a violation has occurred, it must send notice of the determination to the subject, the complainant, and, in the case of a statewide elected official, both the President pro tem of the Senate and the Speaker of the Assembly.[13] If the subject is a state officer or employee, the appointing authority must be notified.

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[13]In the case of senators and assemblymen, notice goes to the President pro tem of the Senate and the Speaker of the Assembly, respectively. In the case of a legislative employee, notice goes to the leader of the appropriate legislative body and to the appointing authority.

If a person files a deficient financial disclosure statement, or neglects to file a statement at all, the Act provides that the person may cure the deficiency within fifteen days of receiving notice from the commission. Only upon failure to cure during this period is a notice of delinquency issued to the appropriate authority.

Additionally, the Act seems to allow an opportunity to "rectify" violations of the conflicts of interest laws and Code of Ethics provisions (Public Officers Law §§ 73 and 74), by providing that, if a commission determines that a "potential conflict of interest violation has been rectified," it shall so inform the covered individual and the complainant confidentially.

The ethics commissions are deemed to be state agencies under the state Administrative Procedure Act. They can assess civil penalties of up to $10,000 for knowing and intentional (or willful) violations of the Act, or they may refer violations to the appropriate prosecutorial agency. They cannot do both. Willful violations, if prosecuted, are punishable as class A misdemeanors.[14]

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[14]Ethics Act Sections 2.6(c), 3.4, 7.11, 7.12, 9.10, 9.11, 15.6, 16.11, 16.12, 16.13 (N.Y. Pub. Off. Law §§ 73(6)(c) & 73-a(4); N.Y. Exec. Law § 94 (11) & (12); N.Y. Legis. Law § 80(10) & (11); N.Y. Gen. Mun. Law §§ 812(6) & 813(11), (12) & (13)).

8. Pre-Emptive Provisions

The Ethics Act pre-empts the application of the Judiciary Law, the Education Law, and all other laws and disciplinary rules with respect to certain conduct permitted by the terms of the Act. As described above, the Act also effectively prohibits prosecution for criminal violations of the key provisions of the Act unless and until the appropriate ethics commission formally refers a matter to a prosecutor.[15]

9. Code of Ethics

The "Code of Ethics," codified in Section 74 of the Public Officers Law, has not been amended in any way by the Ethics Act. Section 74 is a statement of ethical principles, couched in precatory language, which sets general standards of

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[15]Ethics Act Sections 2.10, 2.11, 2.14, 3.4 (N.Y. Pub. Off. Law §§ 73(10), (11) & (14), 73-a(4)).

conduct for state agency officers or employees and legislative members or employees.[16]

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[16]Section 74 is not a detailed proscription of conduct; rather, it advises, among other things, that public officials should not accept employment that will impair their independence of judgment in the exercise of their official duties; engage in activities that will require them to disclose or use confidential information gained by virtue of their official position; engage in transactions when representing the State with entities in which they have a financial interest; or invest in enterprises which they know could create conflicts of interest.

Additionally, full-time officers or employees of state agencies (and firms or associations of which they are members, or corporations in which they own or control a "substantial portion of stock") are counselled not to sell goods or services to any entity licensed by the state agency by which they are employed. State employees are also enjoined to disclose financial interests of $10,000 or more in any activity subject to a state regulation.

Despite the precatory language of Section 74, New York Executive Law § 74(2)(c) authorizes the promulgation of administrative rules and regulations relating to conflicts of interest, and knowing and intentional violation of these standards may result in fines, suspension, or removal from office. N.Y. Pub. Off. Law § 74(4). See generally Nicholas v. Kahn, 47 N.Y.2d 24, 389 N.E. 2d 1086, 416 N.Y.S. 2d 565 (1979); Hanley v. Wickham, 32 A.D.2d 680, 299 N.Y.S.2d 745 (3d Dep't 1969).